United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee :

v. :

RUBEN DARIO ROLDAN :

Appellant :

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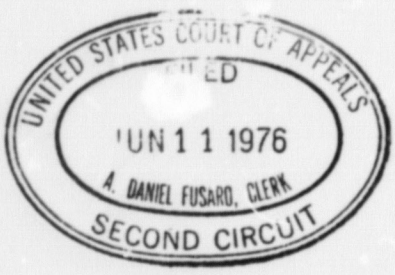
76-1113

BRIEF FOR APPELLANT RUBEN DARIO ROLDAN

Appeal from A Judgment Of
Conviction In The United
States District Court For
The Southern District Of
New York



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ISSUES PRESENTED FOR REVIEW

Appellant Ruben Dario Roldan has participated in a Joint Brief raising issues common to all of these narcotics conspiracy defendants. This Brief concentrates on three issues which apply principally to him.

1. Whether the district court erred in permitting an Assistant United States Attorney to testify about pre-arraignment statements by Roldan. The Assistant's pointed suggestion of a seventy-five year sentence violated Roldan's rights under Miranda v. Arizona, 384 U.S. 436 (1966), as shown by United States v. DuVall, (2d Cir. February 26, 1976);

2. Whether the district court erred in permitting the official Spanish interpreter Gustavo Hoffman, to make non-expert comparisons of Roldan's

voice, based solely on listening to the wire taps he was identifying. Hoffman was not competent to testify. United States v. Chiarizio, 525 F.2d 289 (2d Cir. 1975), upon which the district court relied, could not sustain the ruling since there at least the agent had heard a voice examplar.

3. Whether the district court erred in refusing to dismiss the indictment for violation of the District's Prompt Disposition Rules. The Government was not ready for trial six months after the indictment. The district court refused to go behind the Government's notice of readiness although United States v. Pollak, 474 F.2d 828 (2d Cir. 1973) mandated that it should.

The district court's error in permitting several conspiracies to be tried together is handled generally in the Joint Brief of Roldan and others. This Brief supplements that with a short discussion of the specific prejudice to Roldan.

STATEMENT OF THE CASE

Defendant Ruben Dario Roldan appeals from his conviction of March 1, 1976 in the United States District Court for the Southern District of New York (Cannella, J.), upon a jury verdict that he conspired to import and sell cocaine.* His sentence was seven years and a $5,000 fine.

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*Counsel is assigned under the CJA.

The case arises out of the sale of drugs from Colombia, the Government alleging a single massive drug trafficking conspiracy which started in 1971 and did not end until the arrests in this case in 1974. The Joint Brief, however, shows that there were three distinct segments: the Pepe Cabrera - Edgar Restrepo distribution from the Bravo Group starting in 1971; the Gaston Robinson, Billy Andries, Lionel Fernandez activities derived from other sources; and the Operation Banshee surveillance and wiretaps on Mono and Mario distributing for the Bravo Group.

Roldan figures solely in Segment III. The Government urged that he had chauffeured Mono in his cocaine dealings, made several cocaine sales for him and bought money orders to transmit Mono's cocaine proceeds to Colombia. The Government's proof took three forms: surveillance, wiretap conversations, and the pre-arraignment interview with Assistant Nesland.*

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*References, unless otherwise specified, are to the transcript of trial. In the separate Appendix to this Brief, we have reproduced the pertinent excerpts from the hearing on the motion to suppress the pre-arraignment statements; the district court's opinion thereon; the Assistant's testimony as to those statements; the Hoffman testimony on voice identification and colloquy pertaining thereto; and pertinent excerpts from the hearing on the Speedy trial motion. To keep the references consistent, we are using transcript citations throughout, rather than Appendix citations.

Surveillance

On twelve different occasions between April and August, 1974 New York City policemen saw Roldan in the company of Mono or of one of his alleged accomplices, Beatrice Gonzalez. On five such occasions Roldan merely drove a car with Mono or Beatrice or both, or exited or entered their residences or restaurants. No criminal activity of any of them was observed. These occurred on April 2, 1974 (3434 - 41), April 15 (3743, 4228), May 6 (3692), May 24 (4431), and July 2 (5036).

On two occasions in July Roldan drove Mono to Queens where Mono (not Roldan) picked up large boxes and delivered them to Manhattan (5003, 5161). Roldan helped Mono carry the boxes from the trunk of his car. Although the Government inferred that there were drugs in the boxes on these particular occasions, there is no evidence that Roldan knew it.

Twice, May 13 and August 19, Roldan was seen with Mono in the company either of Bernardo Roldan, his uncle, or Marconi Roldan, his brother (5088, 5271). No criminal activity was observed although on May 13, the parties (not Roldan) closed the blinds of Mono's apartment (5088). On a third date, May 3, Roldan was seen in front of Mono's building with his brother Marconi, and two others, standing by a car with an open trunk (3953 - 54).

There were two other episodes.

On May 3, Roldan went with his brother Marconi, his uncle Bernardo, Mono and someone named Hamilton from 64th Street to El Moro Restaurant on St. Nicholas Avenue (4418). They were in and out of the restaurant and made and received several telephone calls over the course of an hour from a public [illegible] booth on the corner. Later, Roldan went into a building about a block away where his cousin lived (4492). No overt illegal activity was observed.

On May 6, Roldan met Mono and Beatrice outside Mono's apartment at 215 E. 64th Street, received an envelope from Mono, and went into the Chemical Bank (3921, 3774). There is no evidence on what was in the envelope or what Roldan did inside the Bank.

The Tapes

The second part of the Government's case came from wiretaps on Mono's phone. The Government had several incriminating conversations in code which, it contended, involved Roldan. There was a very real question, however, whether the Government was right.

The calls in question had not been made to Roldan, but allegedly by him.* The party on the tapes had called himself "Dario." Dario was a common Spanish name, and another Dario was distributing cocaine with Mono at the same time and was also mentioned in the tapes (7292, 6437).

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*Thus, the Government could not draw the benefit of evidentiary Rule 901(b)(6).

Fearing that it might lose on identification, the Government turned to Gustavo Hoffman -- one of the Spanish interpreters at the trial. Hoffman was not an expert in voice identification (6480). Except for listening to the tapes as part of his translating assignment for the Government, he had never heard Roldan. The Government put in evidence Tapes No. 439 (G. Ex. 200D) and 724 (G. Ex. 200D-3) in which Mono had called Roldan's number, had asked for Dario, and had been answered by a person purporting to respond to that name (6470). Those tapes were non-incriminating. The Government then had Hoffman testify that in his opinion the Dario in those tapes was the same as the voice in the incriminating tapes (6458).

The district court overruled objections to Hoffman's competence. It conceded that he was not an expert. It found, however, that under United States v. Chiarizio, 525 F.2d 289 (2d Cir. 1975), anyone could give an opinion on the voice in the tapes (6464 - 65).

The tapes emphasized by the Government in summation were as follows (7913 - 20):

Conversation No. 437, May 16, 1974.
"Dario" tells Mono that things didn't turn out as he would like, that there was damage, and that the car was no good because it was battered (the Government claims these were code words for narcotics transactions).

Conversation No. 480, May 17, 1974.

"Dario" tells Mono that he couldn't get rid of something because it has no aroma and this has now happened three times.

Conversation No. 297, May 12, 1974.

Mono instructs an unknown male (claimed to be "Dario") to take someone "a small book so he may start reading," and mentions "two books."

Conversation No. 677, May 23, 1974.

Party claimed to be Roldan tells Mono he has the two Quixote books in the Bronx. Mono tells him to lend them to his friends to read.

The Government also introduced a schedule prepared from Roldan's phone bills showing 30 calls from his residence in Union City, New Jersey to Mono's apartment and one to another alleged co-conspirator, the priest.

During its deliberations, the jury asked to hear, and the court played, tapes 437, 472 and 552 which mentioned "cars" or"battered cars" (8634 - 35, 8643 - 46).

The Consent Statement

The last part of the Government's case consisted of statements Roldan made in a pre-arraignment interview. The Government had arrested him on October 4, 1974. He had gone before Judge Weinfeld at

about 4:30 P.M. on October 5 (5956) to fix bail. Several hours before that, however, Assistant United States Attorney James Nesland had taken statements from Roldan and from defendant Beatrice Gonzalez (5944).

The district court held a joint hearing on admissibility (5943). Gonzalez came first. Nesland stated that he had identified himself, had told Gonzalez of the indictment, and taken her through the Miranda questions on U.S. Form 306 (5947 - 48). Gonzalez answered that "she would have to have an appointed attorney because she did not have the funds to retain her own attorney" (5948). Nesland asked if she would continue with the questions and answers in the absence of her attorney. Gonzalez responded "yes" (5949), and the questioning continued with a resulting incriminating statement.

Nesland followed the same procedure with Roldan (5970 - 5972), with the sole difference as far as this record reflects, that Roldan did not expressly request an appointed attorney.* It was established that during the interview, Nesland had told Roldan he could get seventy-five years under the indictment (5971).

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*There is nothing specific in the record one way or the other. The only evidence is that Nesland didn't note a request on the 306 form.

The court suppressed the Gonzalez statement. It found (6014) that Gonzalez was twenty-six, spoke no English, had no experience in questioning by authorities, and was being held in the security section with marshals and attorneys present. She was asked questions on the merits immediately after indicating she wanted counsel, without being "given any time to reflect" (6015). There was, therefore, no intelligent waiver. Roldan's motion to suppress, however, was denied on the ground that Roldan "clearly indicated that he understood" his rights, and being apprised of them, answered affirmatively when asked if he wanted to give a statement (6015 - 16).

Nesland then went on to testify that during the interview, Roldan stated, among other things, that he bought money orders for $1,000 on three or four occasions (6843) and had been paid $70 or $80 for doing it. Nesland also asked Roldan about a conversation about two Don Quixote books (one of the tape references). He responded that he had only "one Don Quixote book" (6853).

Roldan's Speedy Trial Motions

The Government originally indicted Roldan in 74 Cr. 939, filed October 4, 1974, charging him and twenty-eight other defendants on the activities arising out of the Operation Banshee phase of the case. The case was assigned to Judge Tyler.

The Government was not ready for trial within 90 days of the indictment. It sought, however, and Judge Tyler granted an additional thirty days. The Government represented in support of its application that part of its case was taken from eleven separate wiretaps covering ten and one half months, one hundred people and 7250 conversations (1000 pertinent ones) all in Spanish requiring translation. Affidavit of Michael Q. Carey, January 10, 1975.

The Government filed its readiness notice on February 18, 1975. Judge Tyler then resigned from the bench, and the case was assigned to Judge Pollack. On April 30, the Government obtained the superseding indictment, 75 Cr. 429. In May the Government finally made available the tape transcripts and wiretap logs which Judge Tyler had directed it to furnish about five months before.

Roldan made two motions in which he argued that the Government's Notice of Readiness was sham, and that the indictment should therefore be dismissed. Judge Pollack considered the first on April 17, 1975. He refused to go behind the Government's statement that it was ready. If, in fact, the Government was not ready, he held, this would come out in its trial presentation, and defendants would then prevail on a motion to dismiss on the merits. Thus, when Roldan's counsel pointed out that the Government could

not supply him with transcripts and therefore was not ready, Judge Pollack replied (Transcript, April 17, 1975, p. 4):

> "THE COURT: What concern do you have as to whether they can or can't be ready for trial? They are ordered to trial this month. They have filed a notice of readiness and they say they are going to go.
>
> Now, how can you resist that?"

Later (pp. 6, 7):

> "THE COURT: . . . If the Government says they are ready and are not, in fact, in a lawyer-like fashion [because the transcripts are not ready], who am I to say that they shouldn't go?"
>
> You will be able to move to dismiss them if they are not ready in the sense that you are trying to explain it."

Roldan's similar motion before Judge Cannella in 75 Cr. 429 was also denied, without opinion.*

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*Judge Pollack wrote no opinion, endorsing on the papers that the motion was denied in accordance with his remarks at the April 17 hearing. Judge Cannella stated from the bench during the trial that the speedy trial motion was denied, giving no reasons.

ARGUMENT

Point I

THE PRE-ARRAIGNMENT INTERVIEW VIOLATED ROLDAN'S MIRANDA RIGHTS SINCE THE ASSISTANT FIRST WARNED ROLDAN OF A SEVENTY-FIVE YEAR SENTENCE. THE NESLAND TESTIMONY PREJUDICED ROLDAN AND WARRANTS REVERSAL.

A. Nesland's Threat of a Seventy-Five Year Sentence Violated Miranda.

The Government's practice to delay arraignment while an Assistant United States Attorney interviews defendant was before this Court in United States v. DuVall, Docket No. 75-1225, Feb. 26, 1976. The defendant was arrested the day before, held in jail overnight, and questioned about noon the following day. The Assistant read the Miranda rights from Form 306. Defendant answered "yes" to each question and then gave a statement. He was taken before the Court a few hours later.

The Court held (page references are to the Slip Opinion):

1. The Sixth Amendment's right to counsel attaches after complaint and immediately upon arrest pursuant to warrant (2134);

2. There is a heavy burden on the Government to sustain a waiver under Miranda when it conducts an interrogation without an attorney (2134); and

3. The United States Attorney pre-arraignment interview procedure is "peculiarly likely to run afoul of Miranda." Such sessions

> "are held for the very purpose of eliciting damaging statements . . . indeed in the present case the Assistant U.S. Attorney admitted as much. The official position of the prosecutor, the one person who can at this stage plausibly assert authority to grant favorable treatment to an uncounseled defendant, makes rigorous enforcement of Miranda peculiarly necessary at this stage. . . . While not every 'prearraignment interview,' as the Government calls it -- a term unknown to the Federal Rules of Criminal Procedure or the ALI's Model Code of Pre-Arraignment Procedure -- combines all the features of this one, the Government should be alerted that such an interview should be conducted with strict regard for the rights of the defendant and free from any suggestions of pressure or threats. Prosecutors engaging in such a practice at least must be particularly scrupulous to observe the cautions of Miranda that the accused not be 'threatened, tricked, or cajoled into a waiver,' 384 U.S. at 476." (Pp. 2138-39)

The Court found a Miranda violation in that case. The Assistant had first discussed the charges with defendant and had advised that these carried "a possible sentence of a hundred years." This threat in itself warranted suppressing the statement.

The Court stated (Pp. 2139-40, emphasis supplied):

> "Duvall testified that the Assistant U.S. Attorney had told him that the charges carried 'a possible sentence of a hundred years.' The Assistant 'couldn't say' that he hadn't. The judge assumed that the Assistant had said what Duvall claimed. The judge was concerned about this since although the remark was correct as a matter of multiplication because of the large number of counts, 'it only tells part of the story.' How small a part is indicated by the fact that, after clear proof of guilt, the judge imposed a prison sentence on only one count. This was for three years, with execution of two years (later changed to two and a half years) suspended. The prosecutor must have known, as the defendant did not, that no judge would impose -- indeed that no prosecutor would seek -- a sentence for the crimes here charged remotely approaching a hundred years, and that a hundred year sentence thus was not 'possible,' in any real sense. Yet a defendant might fear at least that the prosecutor would ask for a very long sentence if he did not 'cooperate.' Such a remark by a prosecutor to an uncounseled defendant from whom he is seeking a waiver of Fifth Amendment rights calls for something more than an expression of judicial concern. The statement to the Assistant U.S. Attorney should have been suppressed."

The pertinent facts of this case are almost identical to DuVall. Roldan had been arrested the day before, held overnight, and questioned about noon the following day. Assistant Nesland had read the Miranda rights and Roldan had answered "yes" to each question. However, before taking the statement Nesland had advised Roldan that he could get fifteen years on each count of

the indictment (5971). That indictment (74 Cr. 939) had five counts, and Roldan was named in every count. The total therefore was seventy-five years. Seventy-five years was no more "possible" than one hundred in DuVall. Ultimately Roldan received seven. The statement, therefore, should have been suppressed.

We do not want to leave the point without commenting on the district court's mistake in distinguishing between Roldan's statement and that of Beatrice Gonzalez. The cases were the same on the facts the court deemed pertinent. Beatrice had never been arrested before. Neither had Roldan. Beatrice was questioned "in the security section of the United States Attorney's Office where there were marshals and attorneys around" (Opinion, 6014). So was Roldan (5970-71), and at various times during the interrogation another United States Attorney and a Drug Enrorcement Agent were present as well (5970). Beatrice "spoke no English and the interpreter's services were necessary in order to interrogate her" (6014). That was true of Roldan (5945).

Beatrice was represented by Legal Aid at the October 5 bail hearing and at the October 7 arraignment. So was Roldan. The Court then appointed CJA counsel, both

for Gonzalez and for Roldan.

Roldan, in short, was as young, inexperienced, unversed in English and intimidated as Gonzalez. His need for Legal Aid and CJA counsel at the bail hearing, arraignment and trial demonstrated that he needed appointed counsel during the Nesland interview as much as Gonzalez. If her waiver did not satisfy Miranda (the court below was right in holding it did not), certainly Roldan's waiver did not satisfy Miranda either. The fundamental rights at issue can not turn on whether Roldan had the presence of mind, in a clearly coercive setting, to verbalize his need for appointed counsel.

B. Nesland's Testimony was not Harmless Error.

The Government will argue, we suppose, that as in DuVall the Roldan conviction can stand in spite of the district court error. This is not so.

DuVall's statements to the Assistant re-iterated other valid statements to Treasury Agents. Their effect, therefore, was largely cumulative. Roldan's statements, on the other hand, were the only ones in the record. This Court's remarks are pertinent: "If the false exculpatory statements had occurred during the Assistant U.S. Attorney's interview alone, the question whether DuVall's conviction could stand might be of some difficulty." (Slip Op. 2142).

Nesland's testimony, in fact, devastated the defense. He brought out:

1. That Roldan came from Medellin, Colombia; was in this country illegally; came from poor circumstances originally; and had not worked here ("he cleaned windows part time, in apartments, and that was about all he did") (6839-40). This tied Roldan to the place from which the conspiracy originated. It portrayed him as an illegal alien, who would not work for a living.

2. That Roldan "was called Dario." This helped the Government on the voice identification issue on the tapes:

3. That Roldan knew Bruno Bravo and had been with him on one occasion (6843, 6848). This tied Roldan to the alleged head of the conspiracy.*

4. That Roldan purchased three or four $1,000 money orders for someone, in return for $70 or $80 (6851). This supplied proof missing from the May 6 surveillance (P. 5 supra).

5. That Roldan had first denied speaking with Mono about two Don Quixote books (6853) but had admitted that he had one Don Quixote book in his house after Nesland read him a wiretap transcript (6853). This concession tied Roldan to the language of the conspiracy.

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*Roldan's statement was actually that he knew"a Bruno." In the Government's version, this became "Bruno Bravo."

We note lastly Nesland's remarks imputing guilt to Roldan -- weighty remarks because of Nesland's official position. Roldan was questioned about other defendants because Nesland "expected Mr. Roldan to know a number of people in the indictment" (6849). Roldan was "evasive" when questioned about money orders. Roldan first denied the conversation on the tape (6853), and only admitted to the Don Quixote book when Nesland read the transcript to him.

Nesland's testimony, therefore, was clearly prejudicial. The conviction cannot stand in the face of it.

Point II

GUSTAVO HOFFMAN WAS NOT COMPETENT TO IDENTIFY ROLDAN'S VOICE. THE COURT ERRED FURTHER IN EXPRESSING ITS OWN OPINION TO THE JURY THAT THE VOICE ON THE TAPES WAS ROLDAN'S

A. Hoffman was not Competent.

Based on United States v. Chiarizio, 525 F.2d 289 (2d Cir. 1975), the court below permitted Gustavo Hoffman to identify Roldan's voice. The court misunderstood Chiarizio, misunderstood competence, and misunderstood the difference between ordinary and expert testimony.

The point was crucial for Roldan because of the incriminating nature of the tapes.

In accord with Federal Rules of Evidence 901(b)(5), this Court has permitted a witness who heard defendant's voice on one occasion state that defendant is the person who spoke on another occasion. United States v. Bonanno, 487 F.2d 654 (2d Cir. 1973); United States v. Rizzo, 492 F.2d 443 (2d Cir. 1974). There is nothing of the expert involved. United States v. Chiarizic, 525 F.2d at 296 (2d Cir. 1975). The witness is competent to make an identification because he has personally heard the defendant's voice. His testimony therefore fulfills evidentiary Rule 602: "A witness may not testify on a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."

In United States v. Bonnano, supra, for example, the agent had previously met Bonnano and knew his voice from those meetings. In United States v. Rizzo, supra, the three detectives who testified had each heard defendant's voice either at a personal meeting, at the time of arrest or both.*

Hoffman, on the other hand, had no personal knowledge of anything. He had been picked at random

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See the Government's Brief in Rizzo in this Court, P. 45, footnote.

the day before and asked to listen to the tapes and express his opinion as a layman that the voice on the incriminating tapes was the same as the voice on the comparison tapes (6457, 6475). His opinion could make no evidentiary contribution which went beyond the jury's own ability to evaluate. If Hoffman was competent, so was anybody. Even the court recognized this when it asked the Assistant (6439): "What would prevent you from getting up here and getting anybody up here, including Mr. Hoffman." Competence (Rule 602) and the general prohibition against opinion testimony except by experts (Rule 701) become meaningless.

United States v. Borrone - Iglar, 468 F.2d 419 (2d Cir. 1972) shows our analysis is right. This Court held that the Government could not use another tape in which the caller had asked for defendant as a foundation for a detective's identification of defendant's voice. The testimony was sustainable only on the basis that the detective had personally met the defendant.

In point of fact, although Hoffman testified in the guise of an ordinary witness, his expression of opinion was really expert testimony. Hoffman understood this. He

complained to the Assistant that he did not want to testify because he was not an expert.*

The Government understood it. When defense counsel mentioned that Hoffman was being called to identify Roldan's voice, the Assistant insisted that he was not there to "identify" but to give an opinion (6435):

> "Mr. JACOBS: Mr. Carey informs me that he intended to call Mr. Hoffman to identify my client's voice.
>
> Mr. CAREY: No. Not to identify your client's voice. To say that the voice in his opinion was the same as the voice in another conversation."

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*Tr.: 6481

"Q. (by Jacobs) Did Mr. Carey tell you why you were chosen for this task?

A. No, sir.

Q. Did you ask him why you were chosen for this?

A. No, sir. I complained, but I didn't ask.

***

Q. (by Carlton) Mr. Hoffman, in response to one of Mr. Jacobs's questions, you said you complained to Mr. Carey about it. Why did you complain about it?

A. Because it is not a pleasant task to testify on matters on which I am not an expert." (6482-83).

The Assistant told Hoffman "that [his] opinion was as good as anybody else's who spoke Spanish and would be asked to identify the voices" (6481).

Hoffman did not then listen to all the pertinent tapes (6476-77). Some he had not heard for many months.

The Assistant added that the Hoffman testimony was to furnish "guidance" for the jury (6439). If, moreover, defense counsel argued on summation that Roldan was not on the incriminating tapes, he would be challenging the expert, Hoffman, not merely the Prosecutor:

> "Mr. CAREY: But Mr. Jacobs saying that I am mistaken is likely to impress the jury more than saying Mr. Hoffman is mistaken." (6438).*

The court knew it too. Of course, it repeatedly stated that Hoffman was testifying as an ordinary witness (6466, 6468), not an expert. However, all its remarks to the jury were about Hoffman's "advisory opinions" (6466, 6468). An ordinary witness does not give "advisory opinions." Only an expert does that.** And Hoffman, of course, was not an expert.

B. The Court Improperly Intruded on Identification

There is a further reason why the Hoffman matter infringed Roldan's rights. During his testimony the court gave up its posture of neutrality and demonstrated its personal agreement with Hoffman's view that the voice on the tapes was Roldan's.

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*As in Chiarizio the Government could have taken an exemplar of Roldan's voice. It never did.

**The court also stated in its charge that Hoffman "appeared to be called as an expert when he was first called." (8575)

It started when the court took over the questioning on Hoffman's qualifications.* The court established that Hoffman had been listening to tapes, in general, for many years (6447); that he had made voice comparisons on the tapes at issue here when he listened (6448); that he had listened to the tapes in this case as many as twenty or thirty times (6449); and that no one had ever questioned the accuracy of his translations (6456).

It continued during Hoffman's cross examination, with the court stating unequivocably its own view that the voice on the incriminating tapes was Roldan's. It interrupted questioning by one of the defense counsel to state (6485):

> "THE COURT: Now, this is nonsense to me. It is perfectly clear to anybody in the courtroom that the voice he identified was Dario's voice, whether it was the caller or the callee or anybody else, and that's the only important thing in the matter."

The damage to Roldan was strong, and real. Hoffman's testimony itself, on the crucial question with respect to the tapes, greatly prejudiced Roldan. It became impossible when the court added its view to Hoffman's.

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*Hoffman was the official court interpreter and had been translating at the trial. His very presence on the stand carried the aura of the court.

Point III

THE DISTRICT COURT ERRED IN REFUSING TO EXAMINE BEHIND THE GOVERNMENT'S NOTICE OF READINESS, AND TO DISMISS FOR VIOLATION OF THE DISTRICT'S PROMPT DISPOSITION RULES

(This point applies as well to Appellant Jorge Gonzalez, who also was named in Indictment 939 and made speedy trial motions similar to Roldan's. Gonzalez joins in this discussion).

Rule 4 of the District's Prompt Disposition Rules requires the Government to be "ready" for trial within six months of indictment or arrest. The rule means exactly what it says: The Government must in fact be ready for trial. Although, following United States v. Pierro, 478 F.2d 368 (2d Cir. 1973) and United States v. Favalaro, 493 F.2d 623 (2d Cir. 1974), the Government must also communicate its readiness to the court within six months, it is the actual readiness not the communication which governs.

The controlling case is United States v. Pollak, 474 F.2d 828 (2d Cir. 1973). Defendant was charged with perjury before the SEC and a federal grand jury. The district court ordered the Government to file a bill of particulars, and to furnish defendant with copies of his

SEC and grand jury testimony and certain documents. The Government filed a timely notice of readiness. It did not, however, comply with the discovery order until eight months later. This Court reversed. The Government's failure to comply with discovery raised the question of whether it was actually ready. In these circumstances, the timely notice of readiness could not control. The Court stated:

> "As for the speedy trial claim under the Second Circuit Rules, however, we are handicapped for lack of findings and under United States v. Scafo, 470 F.2d 748 (2d Cir. 1972), we must vacate the judgment and remand for further hearing on the motion to dismiss and specific findings on the issue whether there were 'exceptional circumstances' justifying 'periods of delay' within Second Circuit Rule 5(1). The Government argues that it complied with the Rules because it filed a 'notice of readiness' on November 18, 1972. But it had not complied with the discovery order. One question is whether the notice of readiness was therefore meaningless." 474 F.2d at 830.

See also United States v. Pierro, 478 F.2d 386, 388 n.2 (2d Cir. 1973), where, citing Pollak, the Court stated: "The filing of a notice of readiness by the Government within the six month period does not, in all cases, foreclose defendants from asserting that the Government was not, in fact, ready within six months. . . . [D]efendants may, where appropriate, attempt to show that

the Government's notice of readiness was 'meaningless' . . .";
United States v. Scafo, 480 F.2d 1312, 1318 (2d Cir. 1973)
relevant question is whether Government was "in fact ready
for trial"; United States v. Bowman, 493 F.2d 594, 598
(2d Cir. 1974); United States v. Counts, 471 F.2d 422,
427 (2d Cir. 1973).

Judge Pollack, therefore, before whom the issue came first, was wrong in believing that he could not go behind the Government's notice.* He had the right, and the obligation, to conduct an evidentiary hearing and develop a full factual record. The Government had represented that the wiretap transcripts were important to its case, and that those transcripts could be ready by February 18. On that basis Judge Tyler had granted an additional 30 days for its readiness notice and directed (albeit without formal order) that the Government turn the transcripts over to defense counsel. The six month cut off came on April 4, 1975. On that date the Government had not yet turned the transcripts over (as in Pollak), and could not turn them over because they were not ready.

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*We can challenge Judge Pollack's ruling in 74 Cr. 939 since, if our argument is right, he should have dismissed the indictment there with prejudice, foreclosing the present indictment. United States v. Flores, 501 F.2d 1356, 1359 n.3 (2d Cir. 1974); Hilbert v. Dooling, 476 F.2d 355 (2d Cir. 1973) (en banc).

These facts are not in dispute. The Assistant admitted to Judge Pollack that "it would be silly to go to trial without a transcript for each individual" (Transcript, April 17, 1975, P. 11). He could not have the transcripts ready until a week thereafter since "90 percent of the documents . . . [were] illegible." (Id., Pp. 12-13). Even the court remarked: "I want the Government to make a showing here that it is not just off in the wings somewhere stalling around" (Id., P. 13).

The Government may respond that it could easily have had ready the transcripts on Roldan. This is no answer. The Government did not indict him separately. It placed him in a massive conspiracy case and obliged him to defend in the context of such a case. The issue had to be the Government's readiness to try that case -- not another one it never saw fit to bring.

In our view this Court has enough to direct dismissal of the indictment. At the very least reversal and remand for an evidentiary hearing is required. United States v. Scafo, 470 F.2d 748 (2d Cir. 1972); United States v. Valot, 473 F.2d 667 (2d Cir. 1973).

Point IV

THE VARIOUS DISTRICT COURT ERRORS ON THE MULTIPLE CONSPIRACY ISSUE SUBSTANTIALLY PREJUDICED ROLDAN

The multiple conspiracy issue is fully discussed in the Joint Brief, and we presume familiarity with it. We add these few points:*

(a) Roldan was involved solely in Segment III -- Operation Banshee. He had nothing to do with Segment II and therefore was seriously prejudiced by the shocking and inflammatory testimony in that part of the case. He had no connection with Segment I and was further prejudiced by having to partake in a trial involving voluminous testimony about that Segment. Roldan made repeated motions for severance, before and during trial. All were denied.

Roldan was in a particularly vulnerable position (and therefore required special consideration) because of the involvement of so many members of his family. These included his uncle Bernard, one of the alleged core conspirators; his brother Marconi; and his cousins.

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*We join in and rely on the points of each of the other appellants insofar as may be applied to Roldan. We direct the Court's attention particularly to Point III of the Joint Brief, demonstrating that the wiretaps in general but especially as to Roldan, should have been suppressed.

(b) Roldan was prejudiced by the district court's failure to charge multiple conspiracies. As a defendant who was involved in only one of the conspiracies, the "all or nothing" charge impeded the jury's consideration of his case free from the problems presented as to Edgar.

(c) The district court never properly charged the jury on the real substantive issue as to him -- whether his limited activities evidenced an agreement to join the massive conspiracy covering many countries, people and misdeeds. The jury was left simply with the impression that if Roldan had had anything to do with Mono, or the other defendants, with respect to drugs, he had to be guilty of joining that conspiracy.

CONCLUSION

In view of the Government's failure to be ready for trial within six months of the indictment, this Court should direct dismissal thereof, with prejudice, or barring that, a hearing of the speedy trial issue.

With respect to the merits, Roldan's statements to Nesland and the wiretap conversations were the proof upon which he was convicted. The Nesland statements, however,

should have been suppressed; and the wiretap issue could not be considered free from the prejudicial and improperly admitted testimony of Gustavo Hoffman.

In the face of these errors (or either of them) the conviction should be reversed.

Respectfully Submitted,

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